Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

3

No. 97-306

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian *ad litem*, Shirley Gee; PATRICIA SETO; SAMANTHA SETO; and COREY SETO,
Petitioners,

v.

SOUTHWEST AIRLINES CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

JOHN L. BURRIS
LAW OFFICES OF JOHN L. BURRIS
1212 Broadway
Suite 1200
Oakland, CA 94612
(510) 839-5200

CORNISH F. HITCHCOCK
(Counsel of record)
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
Attorneys for Petitioners

September 1997

9 pp

TABLE OF CONTENTS

	Page
REPLY TO BRIEF IN OPPOSITION	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 4-5, 6

Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996) 1-2, 4

Diaz Aguasviva v. Iberia Lineas Aereas de Espana, 902 F. Supp. 314 (D.P.R. 1995) 4

Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995) 1-3, 4-5

Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995)(*in banc*) 1-3, 5

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 3-6

Romano v. American Trans Air, 56 Cal. Rptr. 2d 428 (2d App. Dist. 1996) 1, 4

Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197 (E.D.N.Y. 1994) 4

Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995)(*in banc*) 2-3, 4, 5

Statutes and Legislative Materials:

Federal Aviation Act, 49 U.S.C. § 40101 et seq.
Section 105, 49 U.S.C. § 41713(b)(1) . . . . . *passim*

H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. (1994) 6

REPLY TO BRIEF IN OPPOSITION

Southwest's Brief in Opposition urges that review be denied on a number of predictable grounds, but its arguments underscore the current disarray in this area of the law and also demonstrate why this case is a good vehicle to resolve the largest remaining legal issue about the preemptive scope of section 105 of the Federal Aviation Act.

1. Southwest begins by asserting that there is no conflict between the Ninth Circuit's decision here and the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 335 (1995) (*in banc*), arguing that these two courts have taken "essentially the same approach" in analyzing the preemptive effect of section 105. Brief in Opposition at 1; *see also id.* at 3-4. Southwest's focus is too narrow, and its argument fails in two respects.

First, Southwest never mentions the fact that the Ninth Circuit's decisions here and in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (1995), cannot be squared with the Texas Supreme Court's decision in *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (1996), not to mention the California Court of Appeal's decision in *Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428 (2d App. Dist. 1996).

The Texas Supreme Court's *Kiefer* decision is important because it flatly rejected a key distinction that the Ninth Circuit made here, namely, that bodily injury claims are to be analyzed differently from claims of emotional injury, with the latter preempted, but not the former (Pet. App. 14). One of the two cases consolidated in *Kiefer* alleged that the airline was negligent when it failed to provide "meet-and-assist" service to a disabled passenger who was changing planes; the passenger became mentally disoriented, wound up in an airport parking lot, and was jailed after getting into an altercation with police. 920 S.W.2d at 275-76. Under the Ninth Circuit's approach here and in *Harris*, this claim would be preempted on the ground that it "relates to" an airline's meet-and-assist "service," which cannot be categorized as part of the "operation and maintenance" of an

aircraft. But that is not the course the Texas Supreme Court took. Instead, *Kiefer* found no preemption of this tort claim, seeing "no difference" between a "claim of injury caused by an article falling from an overhead compartment and a claim of injury caused by an airline agent's mishandling of a wheelchair in meeting or assisting a passenger." *Id.* at 284.

The Ninth Circuit's decisions here and in *Harris* thus cannot be reconciled with *Kiefer*, and Southwest is simply wrong in asserting that petitioners' tort claims in this case would be preempted "under any analysis." Brief in Opposition at 6.

Second, Southwest's exclusive focus on *Hodges* ignores the conflict between this case and *Harris*, on the one hand, and, *Hodges'* companion case, *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995)(*in banc*), on the other.

Smith (like this case) did not involve a bodily injury claim, but claims of emotional injuries based on the airline's alleged failure to prevent the boarding of a "visibly deranged" passenger who proceeded to hijack the aircraft. 44 F.3d at 347. The Fifth Circuit found no preemption, explaining that the Airline Deregulation Act sought to deregulate airline economics; thus, a tort claim involving an airline's boarding practices or "services" would be preempted if the plaintiffs challenged an airline's economic decisions, such as whether to overbook its flights. Because *Smith* presented no such challenge, the passengers' claim was allowed to proceed, even though the Fifth Circuit acknowledged that a damages award "could affect the airline's ticket selling, training or security practices." *Id.*

Smith is "on all fours" with *Harris*, as the dissenting judge argued forcefully in *Harris*, 55 F.3d at 1478 (Norris, J., dissenting), and Southwest's focus on *Hodges* cannot obscure the irreconcilable conflict with *Smith*. Both here and in *Harris*, the passenger's suit was "based upon the flight crew's failure to protect her from [other passengers'] abusive behavior and for exacerbating the known risk of emotional and physical injury by

serving [the other passengers] more alcohol." *Id.* Under *Smith*'s analysis, section 105 would preempt claims "relating to" the "service" of beverages only if the claim affected the airline's "economic decisions" about whether to offer drinks on a flight or at what price, if any. A damages recovery in *Harris* or the present case might "affect the airline's training or security practices regarding how to protect passengers from harassment, but it would not regulate the economic or contractual aspects of the airline's provision of beverages." *Id.*

Southwest correctly observes that the majority opinion here did cite *Hodges* and *Smith*, but these citations were limited to the proposition that a distinction exists between airline services and operations. Brief in Opposition at 4, citing Pet App. 15-16. Two paragraphs earlier, the majority made clear its view that "[e]motional injury claims" are "quite different from safety-related personal injury or death claims concerning airline operations or maintenance" (Pet. App. 14). Reading that opinion in tandem with *Harris* and *Smith*, it becomes clear that "emotional injury claims" are preempted in the Ninth Circuit, but not in the Fifth Circuit. Southwest thus errs in its denial that a conflict exists, as well as its more extravagant claim that the Fifth Circuit would likely come out the same way on the facts presented here and in *Harris*. Brief in Opposition at 4-5.

2. Nor is Southwest on firmer ground when it argues that this case has "unique" facts, which make it unsuitable for resolving issues about the preemptive scope of section 105. Brief in Opposition at 6-7.

At the outset, the factual similarities between this case and *Harris* suggest, unfortunately, that petitioners' experience was not unique. Also, as our petition noted (at 18 n.5), airlines have lately been coping with an increase in abusive conduct by rowdy passengers that is directed against both passengers and crew.

More broadly, the factual setting here is no more "unique" than were the facts in *Morales v. Trans World Airlines, Inc.*,

504 U.S. 374 (1992), or *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). *Morales* addressed a first-of-its-kind effort by state attorneys general to enforce consumer protection laws against airlines under a set of enforcement guidelines. *Wolens* was the only reported case where a passenger challenged an airline's effort to change frequent flier eligibility retroactively.

In similar fashion, this case presents a useful vehicle to resolve questions about the effect of section 105 on various tort claims that do not involve bodily injury. Southwest suggests that the lack of a bodily injury claim argues against granting review, Brief in Opposition at 6, but this is an odd position to take, given that the courts are apparently unanimous in rejecting a preemption defense in bodily injury cases, a point made by the California Court of Appeal after surveying the case law in *Romano*. 56 Cal. Rptr. 2d at 431.

By contrast, tort claims that do *not* involve bodily injury represent the one remaining area of section 105 jurisprudence where the courts are badly divided. The point is illustrated by this case, *Harris, Smith, Kiefer* and *Romano* -- and those are only the appellate decisions. There have also been disparate results in the federal district courts, although most of them, even after *Morales*, "have found broad preemption inappropriate in 'services' cases" where tort claims are alleged. *Sedigh v. Delta Airlines, Inc.*, 850 F. Supp. 197, 201 (E.D.N.Y. 1994)(finding no preemption of claims for assault, intentional infliction of emotional distress, false imprisonment); *accord Diaz Aguasviva v. Iberia Lineas Aereas de Espana*, 902 F. Supp. 314, 318-19 (D.P.R. 1995) (surveying case law and finding no preemption in most non-bodily injury cases).

To be sure, the precise legal question in this case is not whether non-bodily injury claims generically are preempted, but whether section 105 preempts the specific torts of negligence, emotional or intentional infliction of emotional distress and the like that are alleged in petitioners' complaint. Nonetheless,

Wolens was similarly limited to the precise breach of contract claim presented by the facts there, yet the Court's opinion has provided clear guidance to courts and litigants and has dramatically reduced litigation over preemption issues in contract cases.

The major issue remaining after *Wolens* is the effect of section 105 on various state tort claims, particularly when no bodily injury has occurred. As the plethora of tort litigation in this area suggests, the issue is not likely to go away, and a ruling by the Court on the merits (whatever the result may be) will do much to bring closure to this area of preemption jurisprudence.

Contrary to Southwest's suggestion, no useful purpose would be served by letting the issue percolate for further consideration in light of *Morales* and *Wolens*. Brief in Opposition at 7-9. In the first place, neither of those cases involved tort claims. Moreover, the Fifth Circuit's rulings in *Hodges* and *Smith* were issued in 1995 by the *in banc* court and are thus unlikely to be reconsidered. The Ninth Circuit was well aware of *Wolens*, as well as *Hodges* and *Smith*, when it decided *Harris*, but was content to adopt an approach to "services" preemption at odds with that of the Fifth Circuit. With the subsequent decisions in *Kiefer* and *Romano*, the split has become even more pronounced. Indeed, Judge O'Scannlain here urged his colleagues to "set our own house in order" (Pet. App. 24). Despite that plea, rehearing *in banc* was rejected, thus leaving *Harris* and this case as the controlling federal precedents in the nine states comprising the Ninth Circuit.

Southwest's willingness to tolerate this tension in the law is curious. Southwest is based in Texas and operates many flights between points in the Fifth and Ninth Circuits, including (for example) non-stops between Dallas and Las Vegas, San Antonio and Los Angeles, and El Paso and Phoenix. Should an incident arise on any of these flights, Southwest's amenability to a state tort claim would depend on whether the passenger files suit in the city where the flight originated or where it arrived and

(possibly) whether the case is tried in state or federal court. That is not a desirable state of events in an industry that operates largely on an interstate basis, but that situation will remain in effect for the foreseeable future if review is denied.

3. The foregoing discussion relates to the point in our petition about the need for granting review in order to determine whether petitioners' tort claims regulate airline "services" in a way that section 105 forbids. Southwest's final argument addresses our related point about the need to review the scope of section 105's "relating to"/"relates to" language in light of the Court's recent ERISA cases. Brief in Opposition at 8-9.

Southwest does not dispute that this Court has refined its ERISA preemption analysis, but treats this development as irrelevant, relying on a single sentence in the conference report accompanying the 1994 recodification of the Federal Aviation Act to the effect that Congress did "not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 83 (1994), cited in Brief in Opposition at 9.

One answer to this, which Southwest seems to acknowledge, is that this bit of history did not dissuade the Court from finding no preemption in *Wolens*, using *Morales* as the point of departure. In any event, Southwest's citation of this history underscores the need for granting review. The Court's recent ERISA cases did not overrule past precedents, but clarified the need to construe state laws in light of statutory purposes and the traditional presumption against preemption. *Morales* anchored its analysis of section 105's "relating to" language in this Court's ERISA cases, and whether section 105 should continue to be construed using ERISA preemption principles is an important issue that only this Court can decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNISH F. HITCHCOCK
(Counsel of record)
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

JOHN L. BURRIS
LAW OFFICES OF JOHN L. BURRIS
1212 Broadway, Suite 1200
Oakland, California 94612
(510) 839-5200
Attorneys for Petitioners

September 1997